Supreme Court, U.S.
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No. 96-307

In The

Supreme Court of the United States

October Term, 1995

CLEVE E. SAPP,

Petitioner,

v.

POWER COMPUTING COMPANY and McDERMOTT INCORPORATED,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court will grant certiorari to consider Petitioner's contention that the courts below disregarded some of his evidence, when the opinions below say and clearly show that both courts fully considered the evidence.

2. Whether this Court will grant certiorari to consider Petitioner's contention that, in order to show that the employer's comparison between Petitioner and other employees was a pretext for discrimination, he need only show that he was as or better qualified than the other employees, not "clearly better qualified," or whether the "clearly better qualified" standard, which was used by the Fifth Circuit in this case, and is in accordance with the decisions of the other Circuits, is a proper method for distinguishing between a possibly mistaken personnel decision and a pretext for discrimination.

PARTIES TO THE PROCEEDINGS

Respondents, Power Computing Company and McDermott Incorporated, are the Defendants. The parent company of McDermott Incorporated is McDermott International Incorporated. The subsidiaries and affiliates of McDermott Incorporated are listed on pages 14 through 22 of the appendix to this brief.

Petitioner, Cleve E. Sapp, is the Plaintiff.

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RESPONDENTS' BRIEF IN OPPOSITION

TO THE UNITED STATES SUPREME COURT:

Respondents, Power Computing Company and McDermott Incorporated, respectfully request that this Court deny the petition for writ of certiorari.

OPINIONS BELOW

The District Court's opinion (Resp. App. 4) is not reported. The opinion of the Court of Appeals (Resp. App. 1) and its order denying rehearing (Resp. App. 13) are not reported.

JURISDICTION

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254(1).

PROVISION OF LAW INVOLVED

29 U.S.C. § 623

It shall be unlawful for an employer – (1) to . . . discharge any individual . . . because of such individual's age.

STATEMENT OF THE CASE

A. Factual Background

Plaintiff-Petitioner Cleve Sapp ("Sapp") was employed by Respondent Power Computing Company ("PCC")[1] as a "team leader" in his department. PCC's business has involved computer outsourcing for a wide range of business and technical applications, and included a software Quality Assurance program that has been approved by the Nuclear Regulatory Commission.[2] (TR 1: 055)[3]

PCC projected that the Quality Assurance business would decrease dramatically in 1995. (TR 1: 055) For this and other reasons, PCC, in 1994, implemented its third reduction in force within a three-year period ("the reduction in force"). (TR 1: 055) In connection with the reduction in force, PCC desired to retain the personnel with the most diversified skills who would best serve the company's needs at that time and also its anticipated or projected needs in the future. (TR 1: 055-56) As part of the reduction in force and in response to the reduced demand for Quality Assurance services, PCC decided to eliminate

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[1] PCC is a subsidiary of a subsidiary of Respondent McDermott Incorporated.

[2] The Quality Assurance program at PCC involved a collection of government regulations and industry standards that controlled the computer software and services provided to the nuclear industry. (TR 1: 055)

[3] This form of citation refers to the volume and page number of the trial court record.

the position of Quality Assurance Auditor, which was held at the time by Ray Munchrath.[4] (TR 1: 055)

Since Munchrath, who was 49 years old at the time of the reduction in force, had skills which PCC determined would be valuable in the future, including skills which would allow him to operate effectively as a team leader in the Computer Operations field, PCC decided to consider retaining Munchrath in one of the four team leader positions in Computer Operations. (TR 1: 056) At that time, four employees, one of whom was Sapp, held a team leader position. All of them, like Munchrath, were over 40 years old.[5] (TR 1: 056)

All five employees were evaluated to determine the four who would best serve PCC's needs in the present, as team leader, and in the future. (TR 1: 056) The manager of Computer Operations, Donn Holsinger, was responsible for recommending which four of the five employees were to be retained. (TR 1: 060) Holsinger considered versatility, skills, and experience when determining which persons would best be able to serve the present customer base as well as future customers. (TR 1: 060)

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[4] After the implementation of the reduction in force, the remaining responsibilities of the Quality Assurance Auditor were performed by three PCC employees who also maintained other positions within the Company. (TR 1: 055) Munchrath remained available to perform auditing tasks as needed. (TR 1: 055)

[5] As of May 25, 1994, the date Sapp was discharged, the ages of the five compared individuals were: Pat Vernon – 57, Cleve Sapp – 56, Ray Munchrath – 49, Roger Carlson – 44, and Tommy Moore – 41. (TR 1: 056)

Holsinger concluded that Sapp was the employee who should be included in the reduction in force. In Holsinger's opinion, Sapp's qualifications did not meet the current and projected needs of PCC as well as those of the other four employees. (TR 1: 060) Holsinger concluded that Sapp's primary skills were in areas which were not projected to be among PCC's current or future business needs, and that in the team leader position and in areas targeted for growth, his skills and experience were less than those of the other four employees. (TR 1: 060) Holsinger's recommendation was approved by the manager of Production and Operational Services, Bill Prange, and Sapp was discharged in May, 1994. (TR 1: 060; TR 2: 022)

B. District Court Proceedings

Sapp filed the instant suit in the United States District Court for the Northern District of Texas, alleging that he was discharged in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C., § 621, et seq., and the Texas Commission on Human Rights Act, Tex. Labor Code, § 21.001, et seq. On May 26, 1995, Respondents filed a motion for summary judgment and on September 5, 1995, the District Court, Hon. Jerry Buchmeyer, granted summary judgment in favor of Respondents. Holding that Sapp met his burden of establishing a *prima facie* case of discrimination and that PCC had articulated a legitimate non-discriminatory reason for discharging Sapp, the Court, in accordance with *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 504, 113 S.Ct. 2742, 2747 (1993), required Sapp to "point to evidence

that the defendant was motivated by discriminatory animus in their employment decision." (Resp. App. 8)[6]

The Court noted that evidence produced by Sapp consisted of his analysis of the criteria issued by PCC to decide which employees to retain, as well as "(1) a remark made by a senior official in the company over five years ago; (2) a decline in the average age of employees after the reduction; and (3) the fact that service and age were noted during the reduction in force." (Resp. App. 8) The Court concluded that Sapp had not pointed to anything in the evaluation process which indicated "that the employer deviated from standard evaluation practices, or other differences in treatment and placement of employees that correlates to age," that the alleged remark was not sufficiently related to the employment decision of which Sapp complained to constitute evidence of age animus, that Sapp's statistical evidence was not "of a quality that raises a genuine issue of fact as to whether the employer was driven by discriminatory animus," and that "consideration of an employee's length of service and age is not evidence of age discrimination." (Resp. App. 9-11) Thus, the District Court held that Sapp "failed to present any evidence which raises a genuine issue of fact as to whether PCC's proffered reasons were mere pretext for discrimination." (Resp. App. 11)

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[6] This form of citation refers to the page number of the Appendix to this Brief In Opposition.

C. Court of Appeals' Proceedings

The Fifth Circuit affirmed with a *per curiam*, unpublished opinion. Noting that Sapp's appeal focused on whether PCC's assigned reason for Sapp's termination, that he was the least qualified of the five candidates for the four available positions, was a "mere pretext for age discrimination," the Court held that Sapp could not sustain this burden "by arguing that the decision was a poor one, i.e., that Sapp was as qualified or more qualified than some of the others with whom he was compared." (Resp. App. 2) Rather, the Fifth Circuit held, such a comparison may justify an inference of pretext only if there is a showing that "the employee was 'clearly better qualified' (as opposed to merely better or as qualified) than the employees who are selected [for a job opening]" (Resp. App. 2) (citing *EEOC v. Louisiana Office of Community Services*, 47 F.3d 1438, 1444 (5th Cir. 1995)). Stating that it had "reviewed the district court's opinion with care," the Fifth Circuit concluded that the District Court's decision to grant summary judgment was appropriate. (Resp. App. 3)

REASONS FOR DENYING THE PETITION

I. SUMMARY JUDGMENT IS APPROPRIATE IN EMPLOYMENT DISCRIMINATION CASES.

Petitioner's argument begins (p. 19 of his Petition) with the contention, not mentioned in his "Questions Presented," that summary judgments should seldom be

granted in employment discrimination cases. Clearly, however, employment discrimination cases are not an exception to Rule 56(c) of the Federal Rules of Civil Procedure, which mandates summary judgment against a party who fails to make a showing sufficient "to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). Further, summary judgment is not to be viewed as a procedural shortcut, "but rather as an integral part of the federal rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Celotex*, 477 U.S. at 327, 106 S. Ct. at 2555. Accordingly, in employment discrimination cases, no issue of fact exists and summary judgment is proper if there is no competent evidence of an intent or motivation of the employer to discriminate against the employee on the basis of his age. *See, e.g., Mesnick v. General Elec. Co.*, 950 F.2d 816 (1st Cir. 1991), *cert. denied*, 504 U.S. 985, 112 S. Ct. 2985 (1992); *Pfluger v. Southview Chevrolet Co.*, 967 F.2d 1218 (8th Cir. 1992). Indeed, in two of the three cases cited by Sapp for the proposition that summary judgment is not proper where there is a claim of employment discrimination, summary judgment in favor of the employer-defendant was affirmed. *See Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955 (5th Cir. 1993); *Waggoner v. City of Garland*, 987 F.2d 1160 (5th Cir. 1993).

Thus, summary judgment is entirely appropriate in employment discrimination cases when, as here, the plaintiff fails to present sufficient evidence of an intent to discriminate.

II. THE COURTS BELOW DID NOT DISREGARD PETITIONER'S EVIDENCE.

In order to prevail on his claim of age discrimination, Sapp had the initial burden of proving by a preponderance of the evidence a *prima facie* case of discrimination. *St. Mary's Honor Ctr.*, 509 U.S. at 508, 113 S. Ct. at 2744. If Sapp was able to prove a *prima facie* case, the burden shifted to PCC and McDermott to articulate some legitimate non-discriminatory reason for PCC's actions. *Id.* Once non-discriminatory reasons for the adverse employment action had been stated, Sapp had the burden of proving that the articulated reasons were not the true reasons, but a pretext for discrimination. *Id.*[7]

Sapp conceded that PCC articulated legitimate, non-discriminatory business reasons for its decision to discharge Sapp. (TR 2: 003) Therefore, to avoid summary judgment, Sapp had to come forth with evidence that PCC's articulated reasons are a pretext for discrimination.[8] *St. Mary's Honor Ctr.*, 509 U.S. at 514-524, 113 S. Ct.

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[7] Sapp's claim of age discrimination under the Texas Commission on Human Rights Act is subject to the same burden shifting rules as his federal claim. *See, e.g., Adams v. Valley Fed. Credit Union*, 848 S.W. 2d 182, 187 (Tex. App. – Corpus Christi 1992, writ denied).

[8] One of the "questions presented" by Sapp is whether, once PCC had articulated legitimate nondiscriminatory reasons for his discharge, Sapp had to present *any* evidence of pretext to prevail. This "question" has already been answered in the affirmative by this Court in *St. Mary's Honor Ctr.*, 509 U.S. at 514-524, 113 S. Ct. at 2751-56, and the fact that Sapp must produce *some* evidence of pretext to avoid summary judgment is illustrated by the cases applying such a requirement discussed on pages 11-22 of this brief.

at 2751-56. "[N]othing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable." *St. Mary's Honor Ctr.*, 509 U.S. at 514-15, 113 S. Ct. at 2751. In other words, in order to meet this burden and avoid summary judgment as a matter of law, Sapp had to come forth with evidence that "(1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complains." *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996).

At pp. 19-21 of the Petition, Sapp relies on (1) a contention that there was no reduction in force in his position, (2) his opinion that he was substantially better qualified than the retained employees, (3) his conclusion that the comparison process was a sham, and (4) an "anti-age" statement as well as statistics. He says that "the Fifth Circuit disregards all of this evidence" and relies solely upon its determination that Sapp had not shown himself "clearly better qualified." Thus, Sapp says, the Fifth Circuit has violated *Patterson v. McClain Credit Union*, 491 U.S. 164, 109 S. Ct. 2363 (1989), reversed by statute on other grounds, 42 U.S.C. § 1981(b), which holds that, in order to establish pretext, the plaintiff is not limited to evidence of any certain type, but may rely on any evidence that will demonstrate that the employee's reasons are pretextual. *Id.*, 491 U.S. at 187-88, 109 S. Ct. at 2378-79.

The difficulty with Sapp's argument lies in its premise – there is no indication that the courts below disregarded any of Sapp's evidence. The district court specifically ruled that PCC "was downsizing the company" in the course of which it "eliminated at least one position from Sapp's department"; it held that the remark, "made years ago in the context of an entirely separate restructuring of the company by someone who did not participate in the decision to discharge Sapp," was not evidence of discrimination (citing *Turner v. North American Rubber, Inc.*, 979 F.2d 55, 59 (5th Cir. 1992)); and it determined that Sapp's "numbers" were presented "without the benefit of statistical analysis" and comprised a group too small to be of significance (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 996-97, 108 S. Ct. 2777 (1987), and *International Board of Teamsters v. United States*, 431 U.S. 324, 339-40, 97 S. Ct. 1843 (1977)). (Resp. App. 8, 9, 11) The district court did not ignore evidence which Sapp offered as proof of pretext, it considered that evidence and found it wanting.

The Fifth Circuit, in its *per curiam* opinion, did not find it necessary to repeat every holding of the district court. Rather, it focused on the argument which it regarded as the one most strongly emphasized by Sapp – i.e., Sapp's claim that he was as qualified or more qualified than some of the other employees with whom he was compared. It then held that Sapp had not raised an inference of pretext. It held that a comparison between employees will permit the inference of pretext "only if [the factfinder could find] that 'the [plaintiff] employee was "clearly better qualified" (as opposed to merely better or as qualified) than the employees who are selected

[for a job opening],' " and that Sapp's evidence "does not rise to that level." (Resp. App. 2) The Fifth Circuit also specifically said that it "had reviewed the district court's opinion with care." (Resp. App. 3)

Petitioner thus has no basis for urging this Court to grant certiorari to decide that, opposite to the statements of the lower courts in their opinions, such courts did not consider and review all of Petitioner's evidence.

III. THE "CLEARLY BETTER QUALIFIED" STANDARD APPLIED BY THE FIFTH CIRCUIT IS APPROPRIATE AND IS SIMILAR TO THAT APPLIED BY THE OTHER CIRCUITS.

Finally, Sapp argues that the "clearly better qualified" standard followed by the Fifth Circuit in this case is "too high." Respondents submit that the "clearly better qualified" standard is entirely appropriate in this case, is a correct application of the policy of the ADEA, and is in line with the holdings of other Circuits.

A. The "Clearly Better Qualified" Standard Is Appropriately Applied To Claims Of Age Discrimination.

As noted above, in order to prevail on his claim of age discrimination, Sapp was required to produce some evidence that the legitimate non-discriminatory reason articulated by PCC for discharging him was pretextual. Thus, when, as here, the employer's reason is that the plaintiff's qualifications were less than those of the retained employees, and the plaintiff attempts to show

pretext by comparing his and the other employees' qualifications, the plaintiff cannot succeed merely by showing that the employer was mistaken, i.e., that plaintiff was as qualified or better qualified than the others. "The inquiry is whether the plaintiff has been discriminated against because of his age; the ADEA proscribes no other conduct." *Elliott v. Group Medical & Surgical Serv.*, 714 F.2d 556, 567 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215, 104 S. Ct. 2658 (1984). Thus, the courts' inquiry is limited to "whether the employer gave an honest explanation of its behavior." *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988). As explained by the Fifth Circuit in *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633 (5th Cir. 1985), the basis for the "clearly better qualified" standard lies in the fact that "Everyone can make a mistake – but if the mistake is large enough, we may begin to consider whether it is a mistake at all." *Id.* at 647. The "clearly better qualified" standard is, therefore, an appropriate method for distinguishing between a possible "mistake" and "pretext," and, indeed, is necessary to prevent the ADEA from "transforming the courts into personnel managers." *Id.*

B. The Circuit Courts Have Uniformly Applied a Standard Similar To The One Applied By The Fifth Circuit.

Sapp notes that the Fifth Circuit requires evidence that a plaintiff was "clearly better qualified" than those who were retained in order to establish pretext, and argues that this Court should grant certiorari on the basis that no other Circuit utilizes the standard. While the terminology may differ, all Circuits use the "clearly better qualified" standard or a similar standard.

(1) Several Circuits have cited to Fifth Circuit cases setting out the "clearly better qualified" standard.

The First, Third, Fifth and Eighth Circuits, either specifically state that an employee seeking to prove pretext through evidence of a disparity in qualifications must be "clearly better qualified," or cite, without qualification, cases from the Fifth Circuit setting forth the "clearly better qualified" standard.

The First Circuit, in *Lehman v. Prudential Ins. Co. of America*, 74 F.3d 323 (1st Cir. 1996), articulated a standard very similar, if not identical, to "clearly better qualified." There, the plaintiff, claiming age discrimination under a state statute, attempted to show that the employer's reason for not promoting him was pretextual by producing evidence that the individual offered the position plaintiff sought was younger and that another agency had performed well under plaintiff's leadership. *Id.* at 329. Applying the burden shifting procedure applied to federal claims of age discrimination and quoting a Fifth Circuit decision following the "clearly better qualified" standard, the court affirmed summary judgment in favor of the employer. In so doing, the court stated:

> We refuse to second guess Prudential's hiring decision for a management position of this nature absent *clearer evidence of irrationality*. . . . "[U]nless disparities in curricula vitae are so apparent as virtually to jump off the page and slap us in the face, we judges should be reluctant to substitute our views for those of the individuals charged with the evaluation duty by

> virtue of their own years of experience and expertise in the field in question."

Lehman, 74 F.3d at 329 (emphasis added) (quoting *Odom v. Frank*, 3 F.3d 839, 847 (5th Cir. 1993)).[9]

Instead of *Lehman*, Petitioner cites an earlier case, *Rossy v. Roche Products, Inc.*, 880 F.2d 621 (1st Cir. 1989), *cert. denied after remand*, 502 U.S. 941, 112 S. Ct. 379 (1991), for the principle that "Summary judgment not appropriate when record is not clear who is the better candidate." (Petition at p. 21). However, this overstates the holding of *Rossy*, in which the court held that "Differences in qualifications between [the plaintiff] and [his replacement] can be considered by the jury in determining if the decision to promote [the person chosen], allegedly based on qualifications, was *unreasonable or arbitrary*." *Id.* at 625 (emphasis added). Thus, *Rossy* does not stand for Petitioner's proposition that an employee who presents evidence that he was equally or merely better qualified than another has presented sufficient evidence to withstand summary judgment on the issue of pretext.

The Third Circuit, in *Healy v. New York Life Ins. Co.*, 860 F.2d 1209 (3rd Cir. 1988), cited the Fifth Circuit decision in *Thornbrough*, 760 F.2d at 647 for the well recognized principle that "[t]he ADEA was not intended to be a vehicle for judicial second-guessing of business decisions, nor was it intended to transform the courts into

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[9] The Eighth Circuit has also quoted the aforementioned passage from *Odom* as a consideration when comparing qualifications of candidates for a particular position to determine whether there is sufficient evidence of pretext. *See Kobrin v. Univ. of Minn.*, 34 F.3d 698, 704 n.4 (8th Cir. 1994).

personnel managers." *Id.* at 1216. In *Healy*, an age discrimination plaintiff presented evidence that a similarly situated younger employee who was retained after a reduction in force had been evaluated lower than plaintiff "in at least one category." *Id.* at 1217. In spite of this evidence, the court affirmed summary judgment in favor of the company, holding that the mixed evidence of plaintiff's superiority was "insufficient evidence of pretext to permit a reasonable fact finder to infer discrimination in the Company's selection of [the younger employee] over [plaintiff]." *Id.*[10]

(2) The other Circuits use standards similar to "clearly better qualified."

The remainder of the Courts of Appeals effectively apply the "clearly better qualified" standard. For example, the Court of Appeals for the District of Columbia has applied what can be described as a "clearly better qualified" standard when determining whether sufficient evidence of pretext has been presented to prevail in an employment discrimination case. In *Fischbach v. District of Columbia Dept. of Corrections*, 86 F.3d 1180 (D.C. Cir. 1996), a bench trial judgment in favor of the employee-plaintiff on his discrimination claim was reversed in favor of the

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[10] *See also Billet v. CIGNA Corp.*, 940 F.2d 812, 826-29 (3rd Cir. 1991) (affirming directed verdict in favor of employer on age discrimination claim based on plaintiff's discharge during a reduction in force despite plaintiff's claim that he had much more experience than a retained employee in management and sales and that plaintiff had a history of "prior good evaluations").

employer, notwithstanding plaintiff's evidence on the issue of pretext that he was arguably better qualified than a person selected for the position:

> Evidence indicating that an employer misjudged an employee's performance or qualifications is, of course, relevant to the question whether its stated reason is a pretext masking prohibited discrimination . . . ; if the employer made an error *too obvious to be unintentional*, perhaps it had an unlawful motive for doing so. Short of finding that the employer's stated reason was indeed a pretext, however – and here one must beware of using 20/20 hindsight – the court must respect the employer's unfettered discretion to choose among qualified candidates. . . . Here the district court found that both [the person selected] and [the plaintiff] were qualified [for the position] – indeed the court went so far as to disclaim any suggestion that [the person selected] was not "highly qualified" – but found also that [the plaintiff] was the *more* qualified applicant. [Defendant] does not dispute that finding, *but it need not do so in order to prevail here*. Title VII liability cannot rest solely upon a judge's determination that an employer misjudged the relative qualifications of admittedly qualified candidates.

Id. at 1183 (emphasis added) (citations omitted).

The Sixth Circuit has also recently made clear that it will not allow a plaintiff to avoid summary judgment by simply presenting evidence that he may arguably have been better qualified than the competition for a particular position. In *Hartsel v. Keys*, 87 F.3d 795 (6th Cir. 1996), the plaintiff claimed she was not promoted because of, *inter*

alia, her age. Defendant responded by articulating a legitimate, non-discriminatory reason for its actions, i.e., that the plaintiff had not been promoted because it was about to implement a major computerization of facilities and plaintiff lacked skills needed. *Id.* at 797. Attempting to establish evidence of pretext and avoid summary judgment, the plaintiff presented affidavits from other employees stating (1) that plaintiff did "a good job" or "great job" and was "well qualified for the [position she was not promoted to]", (2) that plaintiff was better qualified than the person promoted, and (3) that it was unnecessary to promote someone with data processing experience. *Id.* at 801. The Sixth Circuit, noting that in some cases "facts may exist from which a reasonable jury could conclude that the employer's 'business decision' was *so lacking* in merit as to call into question its genuineness," *id.* at 800, emphasis added, affirmed a summary judgment in favor of the employer:

> There is no doubt that [the person promoted] and [plaintiff] have differing strengths and weaknesses, and that [plaintiff] performed her duties as Office Manager and Acting Superintendent well. The law does not require employers to make perfect decisions, nor forbid them from making decisions that others may disagree with. Rather, employers may not hire, fire, or promote for impermissible, discriminatory reasons.

Id. at 801.

The Seventh Circuit has also applied what can only be described as a "clearly better qualified" standard when determining whether sufficient evidence of pretext

exists. In *Gustovich v. AT&T Communications, Inc.*, 972 F.2d 845 (7th Cir. 1992), one of the plaintiffs discharged in connection with a reduction in force attempted to show pretext by evidence that her appraisals contained less criticism than the appraisals of some of the retained employees. The court held that such evidence "gets us nowhere" and affirmed summary judgment in favor of the employer:

> [T]he question is not whether the managers displayed skill in expressing subtle gradations in the supervisors' performance, but whether the managers' explanation is honest rather than fabricated to hide discrimination. . . . Plaintiffs have pointed to many facts and events that are *consistent* with age discrimination, but have presented no evidence that age *actually motivated* AT&T's decision to terminate them. Whether or not their skills were under-appreciated, their age was not held against them – and age is the only consideration the ADEA puts off limits.

Id. at 849, 851 (emphasis in original).

A Tenth Circuit decision, *Rea v. Martin Marietta Corp.*, 29 F.3d 1450 (10th Cir. 1994), is cited by Sapp for the principle that pretext can be inferred from evidence that a plaintiff who was not promoted was more qualified. However, the *Rea* court, citing without qualification the Fifth Circuit decision in *Thornbrough*, 760 F.2d at 647, found no evidence of pretext and affirmed summary judgment for the employer despite the fact that a younger employee who ranked lower than the plaintiff in departmental rankings was chosen for a particular position instead of plaintiff. *Rea*, 29 F.3d at 1457.

Moreover, in *Sanchez v. Philip Morris Inc.*, 992 F.2d 244, 247 (10th Cir. 1993), the Tenth Circuit held that evidence that a plaintiff may have been better qualified than the person selected for a particular position is insufficient to establish pretext in an employment discrimination case. Reversing a bench trial decision in favor of the plaintiff-employee and rendering judgment in favor of the employer, the Tenth Circuit stated:

> It is conceivable that a plaintiff in a case such as this could be *so overwhelmingly better qualified* than another applicant that on this evidence alone a trial court could properly find pretext and intent to discriminate. However, the facts in the record do not suggest this was such a case. There was a difference in the qualifications of the two applicants here concerned. There was a difference in their experiences. . . . The trial court did not suggest that the difference in "qualifications" was the equivalent of discrimination. Again the court made no finding of discrimination. *Instead it considered that its finding of differences in qualifications was in itself sufficient to support a judgment for [the employee]. This cannot be.*

Id. at 247-48 (emphasis added).

The Eleventh Circuit has also ruled in a manner consistent with the "clearly better qualified" standard. In *Brown v. American Honda Motor Co.*, 939 F.2d 946 (11th Cir. 1991), the plaintiff claimed he was denied a dealership with the defendant because of his race. As evidence of pretext, plaintiff argued that "his application and credentials were superior to those of the [white applicants who were selected]. According to the plaintiff, his community

contacts, net worth, proposed floor space, initial capital investment, and location presented a more favorable application package than that submitted by [the other candidates]." *Id.* at 953. The court affirmed a summary judgment in favor of defendant, holding that even the objective evidence of superior qualifications presented by plaintiff was insufficient to establish that defendant's articulated non-discriminatory reason for selecting another person for the position was a pretext for discrimination:

> Accepting plaintiff's conclusion that his application was superior . . . in virtually every listed aspect does not compel a decision in plaintiff's favor. To rebut plaintiff's prima facie case, *the defendant need not demonstrate that the individual . . . selected was actually more qualified than the plaintiff*, rather it must only show that it had a legitimate non-discriminatory reason for its action. . . . Although the plaintiff has produced scattered pieces of circumstantial evidence, none of it, even taken as a whole, raises sufficient questions to undermine [defendant's] non-discriminatory rationale.

Id. at 953, 954 (emphasis added).

The remaining Circuits have also affirmed summary judgments or directed verdicts in favor of employers even in situations where plaintiffs presented some evidence that reasonable persons could differ as to whether they were more qualified for a position than similarly situated younger employees. *See, e.g., Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1116 (2nd Cir. 1988) (Pretext can be found based on an argument that differences exist between the qualifications of a plaintiff and a similarly

situated employee outside the protected class only where facts exist that would indicate that a business decision was "*so lacking in merit* as to call into question its genuineness.") (emphasis added); *Conkwright v. Westinghouse Electric Corp.*, 933 F.2d 231, 235 (4th Cir. 1991) (If an employee's "ratings were *wildly out of line* with other indicia of an employee's performance then one may question whether the rating system had a bias in its implementation.") (emphasis added); *Merrick v. Farmers Insurance Group*, 892 F.2d 1434, 1438 (9th Cir. 1990) (Plaintiff failed to "raise a triable issue of fact that [defendant's] reasons for denying him [a promotion] were pretextual," notwithstanding evidence that plaintiff had been recommended by his supervisor and had "greater experience and . . . somewhat better job performance" than the person selected for the position.).

The cases discussed above show that when determining whether there is sufficient evidence of pretext in a case such as this, every Federal Circuit has either cited to or, in practice, applied the "clearly better qualified" standard utilized by the Fifth Circuit in this and prior cases. Further, Petitioner has cited no case, and we have found none, which questions or criticizes this standard. As such, there is no reason for this Court to grant certiorari.

CONCLUSION

This case raises no issue worthy of review by this Court. Respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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Counsel for Respondents

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-10931
Summary Calendar

CLEVE E. SAPP,

Plaintiff-Appellant,

v.

POWER COMPUTING COMPANY; MCDERMOTT, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(3-94-CV-2518-R)

(Filed April 23, 1996)

Before KING, JOLLY, and PARKER, Circuit Judges.

PER CURIAM:*

Cleve E. Sapp filed suit in federal district court in Dallas against Power Computing Company ("PCC") and its corporate parent, McDermott Incorporated ("McDermott"), alleging that his employment with PCC was terminated in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 21.001 et seq. Upon completion of most of the discovery, PCC and McDermott filed a

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

motion for summary judgment. After Sapp filed his response, the district court granted summary judgment for the defendant. Sapp timely appealed.

The district court properly found, on the basis of the summary judgment evidence, that Sapp had established a prima facie case of age discrimination and that PCC had met its minimum burden of producing a legitimate, non-discriminatory reason for his discharge: during a reduction in force at PCC, Sapp was compared with other individuals to determine who would occupy the slots remaining after the reduction in force and Sapp was found to be the least qualified and therefore terminated. Sapp's appeal focuses on whether the district court was correct when it determined that the evidence that Sapp produced was not sufficient to allow a jury to find that this reason was a mere pretext for age discrimination. Sapp attempted to show in the district court, and argues on appeal, that the rationale articulated by PCC for the decision to discharge him was not the true reason by arguing that the decision was a poor one, i.e., that Sapp was as qualified or more qualified than some of the others with whom he was compared. As PCC correctly argues, however, a fact finder may infer pretext only if it finds that "the employee was 'clearly better qualified' (as opposed to merely better or as qualified) than the employees who are selected [for a job opening]." *EEOC v. Louisiana Office of Community Services*, 47 F.3d 1438, 1445 (5th Cir. 1995). We have reviewed the evidence proffered by Sapp, consisting mainly of his own subjective evaluation of the relative qualifications of the employees at issue, and we agree with the district court that it does not rise to that level.

Sapp argues that the district court improperly relied on Sapp's lack of direct evidence of age discrimination. We have reviewed the district court's opinion with care, and we find no such reliance. In the interval since the district court's decision, this court has issued its en banc decision in *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (en banc), and the district court's opinion in this case fares well under the rationale adopted in *Rhodes*.

The judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT OCURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CLEVE E. SAPP, *Plaintiff,*	§	CA 3-94-CV-2518-R
vs.	§	(Filed Sept. 6, 1995)
POWER COMPUTER COMPANY and MCDERMOTT INCORPORATED, *Defendants.*	§	

MEMORANDUM OPINION AND ORDER

Now before this Court is the Motion for Summary Judgment of Defendants. Plaintiff alleges that he was discharged in violation of the Age Discrimination in Employment Act ("ADEA") and the Texas Commission on Human Rights Act. For the reasons stated below, the Motion is **GRANTED**.

BACKGROUND FACTS

Until his discharge in May 1994, Plaintiff Cleve E. Sapp ("Sapp") was employed by Defendant Power Computing Company ("PCC") as one of four team leaders in his department. He had been employed by PCC and its predecessors since 1956. PCC is a subsidiary of a subsidiary of McDermott Incorporated ("McDermott").

In response to market conditions, PCC implemented reductions in force in 1992, 1993, and again in 1994. During the 1994 reduction in force, one position in Sapp's department was eliminated, that of Quality Assurance

Auditor held by Ray Munchrath ("Munchrath"). Rather than discharge Munchrath, PCC decided to consider him for a team leader position. Munchrath, Sapp and the other three team leaders were evaluated and ranked by manager Donn Holsinger to determine the four candidates that would best meet PCC's present and future needs. Holsinger's recommendation was approved by another manager, Bill Prange. Sapp was ranked fifth in the group and discharged.

At the time of his discharge, Sapp was fifty-six years old. Munchrath was forty-nine. The other three team leaders were fifty-seven, forty-four and forty-one. As evidence of age discrimination, Sapp points to a comment made in the "late 1980's" by the president, then head of operations, of PCC that "sometimes us old fogies must move over for these younger dynamic guys." Sapp has also pointed to a decline in the average age of various groups of employees as a result of the reduction in force, and finally to the fact that length of service and age were noted during the reduction.

ANALYSIS

Rule 56(c) of the Federal Rules of Civil Procedure allows summary judgment only where there is no genuine issue as to any material fact and the moving party is entitled to summary judgment as a matter of law.[1] All reasonable doubts and inferences must be decided in the light most favorable to the party opposing the motion.[2]

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[1] FED.R.CIV.P. 56(c).

[2] *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 640 (5th Cir. 1985).

Indeed, as long as there appears to be some evidentiary support for the disputed allegations, the motion must be denied.[3] A summary judgment motion may be "opposed by any kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves. . . . "[4] However, summary judgment must be granted against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."[5]

In an action under the Age Discrimination Employment Act ("ADEA"), summary judgment for the defendant is appropriate when the plaintiff has failed to make out a prima facie case of discrimination.[6] As well, it may be appropriate if, after the defendant has rebutted the plaintiff's prima facie case with legitimate non-discriminatory reasons for its employment decision, the plaintiff fails to produce evidence that such reasons are merely a pretext for discriminatory animus.[7]

In age discrimination cases, a prima facie case is established when the plaintiff presents evidence (1) that he was discharged; (2) that he was qualified for the position, (3) that he was within the protected age group; and (4) that he was (i) replaced by someone outside the

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[3] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Coke v. Gen. Adjustments Bureau*, 640 F.2d 584, 595 (5th Cir. 1981 (en banc)).

[4] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

[5] *Id.* at 323.

[6] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955 (5th Cir. 1993).

[7] *See Bodenheimer*, at 957.

protected class, (ii) replaced by someone younger, or (iii) otherwise discharged because of his age.[8]

PCC contends that because this is a reduction in force case the Court should require Sapp to establish the slightly modified prima facie case applicable in reduction in force scenarios, which requires either direct or circumstantial evidence of age discrimination.[9] However, the prima facie case set out above addresses both the standard age discrimination scenario and the reduction in force situation. If the position has been filled by another person, then the presumption of discrimination is created by evidence that the replacement was younger or outside the protected age group. If the position is eliminated altogether, the plaintiff may still create an inference of discrimination by presenting evidence of discrimination.

Sapp has established a prima facie case. It is undisputed that he was discharged. Sapp has presented evidence that he was qualified, and PCC has conceded this in the course of arguing that he was less qualified than the four people who were retained. At age fifty-six, Sapp was within the protected class of people over age forty. Finally, Sapp presented evidence that PCC filled the position with Munchrath, a forty-nine year old whose position was eliminated at the time.

Once a prima facie case is established by the plaintiff, the burden then shifts to the defendant to articulate a

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[8] *Id.*

[9] *See Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981).

legitimate, non-discriminatory reason for the employment decision.[10] PCC has carried this burden with evidence that it was downsizing the company, that it eliminated at least one position from Sapp's department, and that Sapp was discharged after being compared to other more qualified employees.

Once the defendant meets the burden of producing a legitimate explanation, the burden shifts to the plaintiff to produce admissible evidence that the proffered reasons are not in fact the reasons for the employment decision, and are merely a pretext for age discrimination.[11] The plaintiff must be able to point to evidence that the defendant was motivated by discriminatory animus in their employment decision.[12] In support of his case, Sapp presents a detailed analysis of the criteria used to decide which employees to retain. As further evidence of pretext, Sapp presents (1) a remark made by a senior official in the company over five years ago; (2) a decline in the average age of employees after the reduction; and (3) the fact that service and age were noted during the reduction in force.

Sapp's attempt to breakdown the criteria used by PCC to compare the five employees fails to strengthen his case. It is well settled that the ADEA was not intended to be a vehicle for second-guessing employment decisions

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[10] *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

[11] *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2747 (1993).

[12] *Id.*

nor to transform the courts into personnel managers.[13] "The ADEA cannot protect older employees from erroneous or even arbitrary personnel decisions, but only from decisions which are unlawfully motivated."[14] It is not enough to simply cast doubt on the employer's decision-making process; the plaintiff must be able to point to direct evidence of discriminatory intent, evidence that the employer deviated from standard evaluation practices, or other differences in treatment and placement of employees that correlates to age.[15] Sapp has not pointed to anything in the evaluation process that would lead the Court to conclude that PCC's employment decisions were driven by age discrimination.

The remark "sometimes us old fogies must move over for these younger dynamic guys" does not show pretext. For an isolated remark to constitute evidence of discrimination, it must be (1) made by either the decision maker or someone whose recommendation was considered by the decision maker, (2) related to the specific employment decision challenged, and (3) made close in time to the decision.[16] The remark set forth by Sapp was made years ago in the context of an entirely separate restructuring of the company by someone who did not participate in the decision to discharge Sapp.

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[13] *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1507-08 (5th Cir. 1988).

[14] *Id.*

[15] *Id.*

[16] *Turner v. North American Rubber, Inc.*, 979 F.2d 55, 59 (5th Cir. 1992).

Similarly, consideration of an employee's length of service and age is not evidence of age discrimination: The Fifth Circuit has rejected any argument to the contrary and stated that such a rule would work the absurd result that an employer would be unable to discuss pension and severance packages with a discharged employee.[17]

For lack of any other proof, the statistical evidence alone must establish that PCC's proffered reasons for discharging Sapp were mere pretext for age discrimination. Gross statistical disparities which result from a reduction in force may be evidence of discriminatory intent.[18] However, the statistics must be strong enough to rebut the valid, nondiscriminatory reason for the discharge.[19] To rebut an employer's explanation on the basis of statistics alone would be a "challenging endeavor" indeed.[20]

Generally, a plaintiff using statistical proof must make the required showing of discrimination by comparing persons qualified for the position at issue.[21] However, evidence that the average age of the work force as a whole has decreased dramatically may also indicate discriminatory intent.[22] In either case, the statistical evidence must be of a quality that raises a genuine issue of

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[17] *Bodenheimer*, 5 F.3d at 958.

[18] *Walther v. Lone Star Gas Co.*, 977 F.2d 161, 162 (5th Cir. 1992) (citing *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1135 (5th Cir. 1983)).

[19] *Id.*

[20] *Thornbrough*, 760 F.2d at 647; *Walther*, 977 F.2d at 162.

[21] *E.E.O.C. v. American Airlines, Inc.*, 835 F.Supp. 911, 914 (N.D. Tex. 1993).

[22] *See Schulz v. Hickok Mfg. Co.*, 358 F.Supp. 1208, 1213 (N.D. Ga. 1973).

fact as to whether the employer was driven by discriminatory animus.

Sapp's evidence fails to meet the challenge. He has analyzed three different groups of people: console operators, tape/print team leaders, and tape service employees. For each group, Sapp computed the average age of persons considered for discharge, the average age of the persons not considered for discharge, and the average age of each group before and after the termination. Sapp averaged the numbers without the benefit of statistical analysis; the Court notes not the inadequacy but rather the utter absence of statistical "technique". Each group is numerically quite small. The most relevant group, the team leaders group of which Sapp is a member, is composed of only five people all of whom are in the protected age group. Only one person, Sapp, was laid off. Accordingly, the numbers have virtually no statistical significance.[23] In short, the Court cannot find that the numbers alone constitute probative evidence of pretext.

Sapp has failed to present any evidence which raises a genuine issue of fact as to whether PCC's proffered reasons were mere pretext for discrimination. The motion for summary judgment is granted on this ground. Accordingly, the Court does not reach the question of

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[23] *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 996-97 (1987) (small or incomplete data sets and inadequate statistical techniques are typical weaknesses of statistical proof); *see also International Board of Teamsters v. United States*, 431 U.S. 324, 339-340 n. 20 (1977) (small sample size detracts from value of statistical evidence).

whether PCC's parent company, McDermott should be treated as Sapp's employer.

CONCLUSION

For the reasons stated above, the Motion is **GRANTED.** It is so **ORDERED.**

SIGNED THIS 5 DAY OF SEPT, 1995.

/s/ Jerry Buchmeyer
UNITED STATES
DISTRICT COURT
CHIEF JUDGE
JERRY BUCHMEYER

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-10931

CLEVE E SAPP

Plaintiff - Appellant

v.

POWER COMPUTING COMPANY; MCDERMOTT, INC.

Defendants - Appellees

Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING

(May 24, 1996)

Before KING, JOLLY, PARKER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen King
United States Circuit Judge

REHG-2

SUBSIDIARIES AND AFFILIATES OF MCDERMOTT INCORPORATED

ABAHSAIN HUDSON HEAT TRANSFER CO. LTD.; AMERICON EQUIPMENT SERVICES, INC.; AMERICON, INC.; ASEA BABCOCK; ASH ACQUISITION COMPANY; B.C. BRIDGE & DREDGING CO. LTD; B&W DE PANAMA, INC.; B&W ENERGY INVESTMENTS, INC.; B&W FEDERAL SERVICES, INC.; B&W FUEL, INC.; B&W HANFORD COMPANY; B&W MEXICANA, S.A. DE C.V.; B&W NUCLEAR ENVIRONMENTAL SERVICES, INC.; B&W NUCLEAR, INC.; B&W PROTEC, INC.; B&W SABA, INC.; B&W SAVANNAH RIVER COMPANY; B&W SERVICE COMPANY; B&W SOFC G.P., INC.; B&W SOFC L.P., INC.; B&W SUNNYSIDE, INC.; B&W SUNNYSIDE, L.P.; B&W TRISO CORPORATION; B&W/OHM WELDON SPRING, INC.; BABCOCK & WILCOX – ST COMPANY; BABCOCK & WILCOX ASIA INVESTMENT CO., INC.; BABCOCK & WILCOX ASIA LIMITED; BABCOCK & WILCOX BEIJING COMPANY, LTD.; BABCOCK & WILCOX CHINA INVESTMENT CO., INC.; BABCOCK & WILCOX CONSTRUCTION CO., INC.; BABCOCK & WILCOX EBENSBURG POWER, INC.; BABCOCK & WILCOX EGYPT SAE; BABCOCK & WILCOX EQUITY INVESTMENTS, INC.; BABCOCK & WILCOX FOREIGN SALES CORPORATION; BABCOCK & WILCOX GAMA KAZAN TEKNOLOJISI A.S.; BABCOCK & WILCOX GENERAL CONTRACTING COMPANY; BABCOCK & WILCOX GOVERNMENT SERVICES COMPANY; BABCOCK & WILCOX IDAHO, INC.; BABCOCK & WILCOX INDUSTRIES LTD.; BABCOCK & WILCOX INTERNATIONAL INVESTMENTS CO., INC.; BABCOCK &

WILCOX INTERNATIONAL SALES AND SERVICE CORPORATION; BABCOCK & WILCOX INTERNATIONAL SALES CORPORATION; BABCOCK & WILCOX INTERNATIONAL, INC.; BABCOCK & WILCOX INVESTMENT COMPANY; BABCOCK & WILCOX JONESBORO POWER, INC.; BABCOCK & WILCOX OHIO, INC.; BABCOCK & WILCOX SERVICES, INC.; BABCOCK & WILCOX TRACY POWER, INC.; BABCOCK & WILCOX WEST ENFIELD POWER, INC.; BABCOCK-ULTRAPOWER JONESBORO; BABCOCK-ULTRAPOWER WEST ENFIELD; BADYA BUILDERS, INC.; BJA-MENTOR PRODUCTION SYSTEMS LIMITED; BROWN & ROOT MCDERMOTT FABRICATORS LIMITED; CATALYTIC MAINTENANCE LIMITED; CCC FABRICACIONES Y CONSTRUCCIONES S.A. DE C.V.; CHARTERING COMPANY (SINGAPORE) PTE. LTD.; CHIYODA HUDSON INTERNATIONAL INC.; CMIR HOLDINGS LTD.; CONSTRUCCIONES MARITIMAS MEXICANAS, S.A. DE C.V.; CREOLE INSURANCE COMPANY, LTD.; DAVY MCDERMOTT LIMITED; DEEP OIL TECHNOLOGY, INC.; DELTA BIRWELCO, INC.; DELTA CATALYTIC (HOLLAND) B.V.; DELTA CATALYTIC (UK) LIMITED; DELTA CATALYTIC CONSTRUCTORS LTD.; DELTA CATALYTIC ENGINEERING LTD.; DELTA CATALYTIC ENVIRONMENTAL SERVICES LTD.; DELTA CATALYTIC INDUSTRIAL SERVICES LTD.; DELTA CATALYTIC INTERNATIONAL CORP.; DELTA CATALYTIC LIMITED; DELTA CATALYTIC PLANT SERVICES LTD.; DELTA CATALYTIC SAUDI ARABIA LTD.; DELTA CATALYTIC SERVICES INC.; DELTA HUDSON ENGINEERING CORPORATION; DELTA HUDSON EINGINEERING LTD.; DELTA HUDSON GOVERNMENT SERVICES,

INC.; DELTA HUDSON INTERNATIONAL, INC.; DELTA HUDSON INTERNATIONAL, LTD.; DELTA PROJECTS (EASTERN) LIMITED; DELTA SERV-TECH LTD.; DIAMOND POWER (AUSTRALIA) PTY. LIMITED; DIAMOND POWER FINLAND OY; DIAMOND POWER HUBEI MACHINE COMPANY, LTD.; DIAMOND POWER SPECIALTY (JAPAN) LTD.; DIAMOND POWER SPECIALTY CORPORATION; DIAMOND POWER SPECIALTY GMBH; DIAMOND POWER SPECIALTY LIMITED; DIAMOND SUPERIOR AKTIEBOLAG; DYNMCDERMOTT PETROLEUM OPERATIONS COMPANY; EASTERN MARINE SERVICES, INC.; EBENSBURG INVESTORS LIMITED PARTNERSHIP; EBENSBURG POWER COMPANY; ENSERCH ENVIRONMENTAL MANAGEMENT COMPANY, INC.; ESPECIALIDADES TERMOMECANICAS, S.A. DE C.V.; ETPM INTERNATIONAL S.A.S.; EUROMAC LTD.; FIRST EMIRATES TRADING CORPORATION; GLOBE STEEL TUBES CORPORATION; GREENBANK TEROTECH PTY. LIMITED; HALLEY-MELLOWES PTY. LTD.; HEEREMA-MCDERMOTT (AUST.) PTY. LTD.; HEEREMAC V.O.F.; HONORE INSURANCE COMPANY, LTD.; HUDSON ENGINEERING (AUSTRALIA) LTD.; HUDSON ENGINEERING (CANADA), LTD.; HUDSON ENGINEERING COMPANY, INC.; HUDSON ENGINEERING DE VENEZUELA, C.A.; HUDSON ENGINEERING INTERNATIONAL, INC.; HUDSON HEAT TRANSFER INTERNATIONAL, INC.; HUDSON NORTHERN INDUSTRIES INC.; HUDSON PRODUCTS AKTIEBOLAG; HUDSON PRODUCTS CORPORATION; HUDSON PRODUCTS DE MEXICO, S.A. DE C.V.; HYDRO MARINE SERVICES, INC.; INITEC, ASTANO Y

MCDERMOTT INTERNATIONAL INC., S.A.; INTERNATIONAL DISARMAMENT CORPORATION; J. RAY MCDERMOTT (AUST.) HOLDING PTY. LIMITED; J. RAY MCDERMOTT (U.K.) INC.; J. RAY MCDERMOTT (VENEZUELA) C.A.; J. RAY MCDERMOTT ARCTIC LTD.; J. RAY MCDERMOTT CONTRACTORS, INC.; J. RAY MCDERMOTT DIVING INTERNATIONAL, INC.; J. RAY MCDERMOTT ENGINEERING HOLDINGS, INC.; J. RAY MCDERMOTT HOLDINGS, INC.; J. RAY MCDERMOTT INTERNATIONAL SERVICES LIMITED; J. RAY MCDERMOTT INTERNATIONAL, INC.; J. RAY MCDERMOTT LONDON, LTD.; J. RAY MCDERMOTT MARINE CONSTRUCTION AS; J. RAY MCDERMOTT PROPERTIES, INC.; J. RAY MCDERMOTT SPARS, INC.; J. RAY MCDERMOTT UNDERWATER SERVICES, INC.; J. RAY MCDERMOTT VENTURE HOLDINGS (U.S.), INC.; J. RAY MCDERMOTT, INC.; J. RAY MCDERMOTT, S.A.; MACDOCK SHIPYARD COMPANY, LTD.; MACSHELF LTD; MACSHELF MARINE CONSTRUCTION COMPANY, LTD.; MAINE POWER SERVICES; MALMAC SON, BHD.; MARINE CONTRACTORS, INC.; MCAMUR CONSTRUCTION SERVICES T.O.O.; MCAMUR SHIPBUILDING COMPANY, INC.; MCANTILLE, N.V.; MCDERMOTT (HOLLAND) B.V.; MCDERMOTT (MALAYSIA) SENDIRIAN BERHAD; MCDERMOTT (NIGERIA) LIMITED; MCDERMOTT – ETPM V.O.F.; MCDERMOTT – ETPM, INC.; MCDERMOTT ABU DHABI OFFSHORE CONSTRUCTION COMPANY; MCDERMOTT AMUR, INC.; MCDERMOTT APG SERVICES LIMITED; MCDERMOTT ARABIA COMPANY LIMITED; MCDERMOTT AZERBAIJAN MARINE CONSTRUCTION, INC.; MCDERMOTT AZERBAIJAN

PIPELINES, INC.; MCDERMOTT AZERBAIJAN, INC.; MCDERMOTT CENTRAL & EASTERN EUROPE, INC.; MCDERMOTT DENMARK APS; MCDERMOTT ENERGY SERVICES, INC.; MCDERMOTT ENGINEERING (EUROPE) LIMITED; MCDERMOTT ENGINEERING HOUSTON, LLC; MCDERMOTT ENGINEERS & CONSTRUCTORS (CANADA) LTD.; MCDERMOTT ENGINEERS & CONSTRUCTORS (USA) INC.; MCDERMOTT FAR EAST, INC.; MCDERMOTT GULF OPERATING COMPANY, INC.; MCDERMOTT HEAT TRANSFER COMPANY; MCDERMOTT HOLDINGS (U.K.) LIMITED; MCDERMOTT INCORPORATED; MCDERMOTT INDUSTRIES (AUST.) PTY. LIMITED; MCDERMOTT INLAND SERVICES, INC.; MCDERMOTT INTERNATIONAL ASSET MANAGEMENT, LTD.; MCDERMOTT INTERNATIONAL AVIATION, INC.; MCDERMOTT INTERNATIONAL B. V.; MCDERMOTT INTERNATIONAL BEIJING, INC.; MCDERMOTT INTERNATIONAL ENGINEERING & CONSTRUCTION CO., LTD.; MCDERMOTT INTERNATIONAL ENGINEERING INVESTMENTS N.V.; MCDERMOTT INTERNATIONAL GENERAL SERVICES, INC.; MCDERMOTT INTERNATIONAL INVESTMENTS CO., INC.; MCDERMOTT INTERNATIONAL MARINE INVESTMENTS N.V.; MCDERMOTT INTERNATIONAL MARINE SERVICES, INC.; MCDERMOTT INTERNATIONAL MARKETING, INC.; MCDERMOTT INTERNATIONAL PROJECT MANAGEMENT, INC.; MCDERMOTT INTERNATIONAL TRADING (HOLLAND 1) B.V.; MCDERMOTT INTERNATIONAL TRADING CO., INC.; MCDERMOTT INTERNATIONAL, INC.; MCDERMOTT MARINE CONSTRUCTION LIMITED; MCDERMOTT MARINE UK LIMITED; MCDERMOTT

MARKETING SERVICES, INC.; MCDERMOTT OFFSHORE SERVICES COMPANY, INC.; MCDERMOTT OVERSEAS INVESTMENT CO. N.V.; MCDERMOTT OVERSEAS, INC.; MCDERMOTT PRODUCTOS INDUSTRIALES DE MEXICO, S.A. DE C.V.; MCDERMOTT PROJECT MANAGEMENT (CYPRUS) LIMITED; MCDERMOTT PROJECT MANAGEMENT, INC.; MCDERMOTT SAKHALIN, INC.; MCDERMOTT SERVICOS DE CONSTRUCAO, LTDA.; MCDERMOTT SHIPBUILDING, INC.; MCDERMOTT SOUTH EAST ASIA PTE. LTD.; MCDERMOTT SUBMARINE CABLE LTD.; MCDERMOTT SUBMARINE CABLE SYSTEM LIMITED; MCDERMOTT SUBSEA CONSTRUCTORS LIMITED; MCDERMOTT TRADE CORPORATION; MCDERMOTT WEST INDIES COMPANY; MCDERMOTT-ETPM (NORWAY), INC.; MCDERMOTT-ETPM (UK) LIMITED; MCDERMOTT-ETPM B.V.; MCDERMOTT-ETPM EAST (MAURITIUS) LTD.; MCDERMOTT-ETPM EAST B.V.; MCDERMOTT-ETPM EAST N.V.; MCDERMOTT-ETPM EAST, INC.; MCDERMOTT-ETPM FAR EAST, INC.; MCDERMOTT-ETPM N.V.; MCDERMOTT-ETPM S.A.; MCDERMOTT-ETPM WEST, INC.; MENCK B.V.; MENCK GMBH; MENTOR ENGINEERING CONSULTANTS LIMITED; MENTOR ENGINEERING, INC.; MIMCO, INC.; MIT (HONG KONG) TRADING LIMITED; MOFCO N.V.; NATIONAL ECOLOGY (ALABAMA) INCORPORATED; NATIONAL ECOLOGY COMPANY; NORTH AMERICAN CWF PARTNERSHIP; NORTH ATLANTIC VESSEL, INC.; NORTH COUNTY OPERATIONS ASSOCIATES; NORTHERN MARINE SERVICES, INC.; OCEANIC RED SEA COMPANY; OFFSHORE ANGOLA, LTD.; OFFSHORE ENERGY CAPITAL CORPORATION; OFFSHORE

HYUNDAI INTERNATIONAL LIMITED; OFFSHORE HYUNDAI INTERNATIONAL, LTD.; OFFSHORE MARINE CHARTERING NV; OFFSHORE PETROLEUM DIVERS, INC.; OFFSHORE PIPELINES (MAURITIUS) LTD.; OFFSHORE PIPELINES FAR EAST LIMITED; OFFSHORE PIPELINES INTERNATIONAL GULF E.C.; OFFSHORE PIPELINES INTERNATIONAL, LTD.; OFFSHORE PIPELINES NIGERIA LIMITED; OFFSHORE PIPELINES SDN. BHD.; OFFSHORE POWER GENERATION LTD.; OFFSHORE PRODUCTION & SALVAGE, INC.; OFFSHORE PRODUCTION VESSELS, LTD.; OPI INTERNATIONAL VESSELS, LTD.; OPI OFFSHORE NETHERLANDS HOLDING B.V.; OPI SALES & SERVICE CORPORATION; OPI TOWING & SUPPLY, L.L.C.; OPI VESSELS, INC.; OPMI, E.C.; OPMI, LTD.; P. T. ARMANDI PRANAUPAYA; P. T. BABCOCK & WILCOX INDONESIA; P. T. BATAVES FABRICATORS; P. T. MCDERMOTT INDONESIA; PALM BEACH ENERGY ASSOCIATES; PALM BEACH RESOURCE RECOVERY CORPORATION; PANAMA OFFSHORE CHARTERING COMPANY 1, INC.; PANAMA OFFSHORE CHARTERING COMPANY 10, INC.; PANAMA OFFSHORE CHARTERING COMPANY 11, INC.; PANAMA OFFSHORE CHARTERING COMPANY, 12, INC.; PANAMA OFFSHORE CHARTERING COMPANY 13, INC.; PANAMA OFFSHORE CHARTERING COMPANY 14, INC.; PANAMA OFFSHORE CHARTERING COMPANY 15, INC.; PANAMA OFFSHORE CHARTERING COMPANY 16, INC.; PANAMA OFFSHORE CHARTERING COMPANY 17, INC.; PANAMA OFFSHORE CHARTERING COMPANY 18, INC.; PANAMA OFFSHORE CHARTERING

COMPANY 19, INC.; PANAMA OFFSHORE CHARTERING COMPANY 2, INC.; PANAMA OFFSHORE CHARTERING COMPANY 20, INC.; PANAMA OFFSHORE CHARTERING COMPANY 21, INC.; PANAMA OFFSHORE CHARTERING COMPANY 3, INC.; PANAMA OFFSHORE CHARTERING COMPANY 4, INC.; PANAMA OFFSHORE CHARTERING COMPANY 5, INC.; PANAMA OFFSHORE CHARTERING COMPANY 6, INC.; PANAMA OFFSHORE CHARTERING COMPANY 7, INC.; PANAMA OFFSHORE CHARTERING COMPANY 8, INC.; PANAMA OFFSHORE CHARTERING COMPANY 9, INC.; PANAMA OFFSHORE CHARTERING COMPANY, INC.; PARADIGM CONSTRUCTORS LTD.; PDC MANTENIMIENTO, S.A.; PERSONAL ADMINISTRATIVO DE VERA CRUZ, S.A. DE C.V.; PERSONAL EJECUTIVO DE VERACRUZ, S.A. DE C.V.; POWER SYSTEMS OPERATIONS, INC.; POWER SYSTEMS SUNNYSIDE OPERATIONS GP, INC.; POWER SYSTEMS SUNNYSIDE OPERATIONS LP, INC.; PSO CARIBBEAN, INC.; REVLOC RECLAMATION SERVICE, INC.; ROCKY FLATS TECHNICAL ASSOCIATES, INC.; SABINE RIVER REALTY, INC.; SAKHALIN ENERGY INVESTMENT COMPANY, LTD.; SAMBURG HOLDINGS, INC.; SAUDI OPMI COMPANY LIMITED; SHARMAN, ALLEN, GAY & TAYLOR, S.A.; SOFCO L.P.; SOUTH POINT CWF; SPARS INTERNATIONAL INC.; SUNLAND CONSTRUCTION CO., INC.; SUNNYSIDE COGENERATION ASSOCIATES; SUNNYSIDE OPERATIONS ASSOCIATES L.P.; TALLARES NAVALES DEL GOLFO, S.A. DE C.V.; THE BABCOCK & WILCOX COMPANY; THE EARLY COMPANY; THERMAX BABCOCK & WILCOX LIMITED; TIGER SULPHUR OPERATIONS

LTD.; TL MARINE SDN. BHD.; TL OFFSHORE SDN. BHD.; TRISO; TRISPEC TECHNICAL SERVICES LTD.; UNIVERSAL FABRICATORS INCORPORATED; VANCOUVER PILE DRIVING LTD.; VARSY INTERNATIONAL N.V.; W. F. AND JOHN BARNES COMPANY; WAGLEY, INC.; 349114 ALBERTA LTD.; 404385 ALBERTA LTD.; 418718 ALBERTA LTD.